BEFORE THE ARIZONA CORPORATION COMMISSION

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CHAIRMAN
JIM IRVIN
COMMISSIONER
RENZ D. JENNINGS
COMMISSIONER

IN THE MATTER OF THE PETITION OF MCIMETRO ACCESS TRANSMISSION SERVICES, INC. FOR ARBITRATION OF INTERCONNECTION RATES, TERMS AND CONDITIONS PURSUANT TO 47 U.S.C. § 252(b) OF THE TELECOMMUNICATIONS ACT OF 1996.	DOCKET NO. U-3175-96-479 DOCKET NO. E-1051-96-479
IN THE MATTER OF THE PETITION OF AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC. FOR ARBITRATION OF INTERCONNECTION RATES, TERMS, AND CONDITIONS WITH U S WEST COMMUNICATIONS, INC., PURSUANT TO 47 U.S.C. § 252(b) OF THE TELECOMMUNICATIONS ACT OF 1996.	DOCKET NO. U-2428-96-417 DOCKET NO. E-1051-96-417

DECISION NO. 60353

ORDER

Open Meeting
August 26 and 27, 1997
Phoenix, Arizona

BY THE COMMISSION:

DISCUSSION

On July 29, 1996, AT&T Communications of the Mountain States, Inc. ("AT&T") filed with the Arizona Corporation Commission ("Commission") a Petition for Arbitration of Interconnection Rates, Terms and Conditions ("Petition") pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996 ("Act"), to establish an interconnection agreement with U S WEST Communications, Inc. ("U S WEST"). An arbitration was held on October 1 through 4, 1996. On December 10, 1996, the Commission issued Decision No. 59915 to resolve the issues submitted by the parties.

On September 4, 1996, MCImetro Access Transmission Services, Inc. ("MCI" or "MCIm") filed a Petition to establish an interconnection agreement with U S WEST. An arbitration was held on October 22, 23 and 24, 1996. On December 18, 1996, the Commission issued Decision No. 59931 to resolve the issues submitted by the parties.

Decision Nos. 59915 and 59931 instructed the parties to prepare and sign interconnection agreements incorporating the terms of the Commission's resolutions within thirty days of the date of the Decisions. Pursuant to the parties' request, the parties received additional time in which to submit executed interconnection agreements. The parties were unable to resolve many of the disputes which arose, and no signed interconnection agreement was filed. On February 25, 1997, AT&T and MCI filed a Joint Request for Approval of Interconnection Agreement ("Joint Request") which contained issues that had been resolved through arbitration or negotiation, and AT&T and MCI's proposed resolution of unresolved issues. AT&T and MCI requested that the unsigned Joint Request be approved as an interconnection agreement.

Also on February 25, 1997, U S WEST filed a Statement Pursuant to R14-2-1506, in which it requested the Commission to reject all contract language submitted by AT&T and MCI which had not been arbitrated or negotiated. U S WEST also requested the Commission reject the contract language based upon arbitrated issues for which it had requested rehearing. Alternatively, U S WEST urged the Commission to adopt language proposed by U S WEST for the unresolved issues.

By Procedural Order dated March 10, 1997, an arbitration between U S WEST, AT&T and MCI regarding the unresolved issues was scheduled. The arbitration was held as scheduled, and recessed periodically to allow the parties additional time to resolve issues and narrow the remaining disputes. The arbitration concluded on May 29, 1997, at which time the arbitrators ruled on many of the disputed issues. The remaining issues were ruled upon by Procedural Order dated July 14, 1997, after briefing by the parties. On July 18, 1997, the Eighth Circuit Court of Appeals issued its decision in *Iowa Utilities Board v. Federal Communication Commission*, Nos. 963321, *et al.*, 1997 WL 403401, (8th Cir. 1997), which vacated certain provisions of the FCC rules. Interconnection agreements which incorporated the issues resolved in Decision No. 59915 and 59931, the parties' negotiated provisions, and the rulings in the July 14, 1997 Procedural Order were submitted to the Commission at Open Meeting on July 30, 1997.

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During Open Meeting, the parties framed an issue which had not arisen previously in its present form, and requested that the issue be submitted for arbitration. By Decision No. 60308 (July 31, 1997), the Commission adopted the rulings of the arbitrators, approved the interconnection agreements, and submitted the following issue for arbitration:

> the issues of combinations of network elements and whether the 1FB, 1FR[1] or other finished service can be requested as an unbundled network element, in light of the recent Court of Appeals 8th Circuit Opinion, with arbitrated contract language concerning those issues to be incorporated into the interconnection agreements.

On July 31, 1997, the Commission issued a Procedural Order governing submission of the issue for arbitration. On August 6, 1997, AT&T and MCI each filed a Supplemental Brief in response to the Procedural Order, and U S WEST filed a Brief Regarding Effect of Eighth Circuit Opinion Unbundling/Rebundling of Network Elements. On August 8, 1997, all parties filed Reply Briefs, and oral argument was held by teleconference. The following is the Commission's resolution of the final arbitrated issue arising from the requests of AT&T and MCI to arbitrate their interconnection agreements with U S WEST.

Issue: Combinations of network elements and whether 1FB and 1FR or other finished service can be requested as an unbundled network element, in light of the recent Court of Appeals 8th Circuit Opinion.

The FCC Rules stated:

> § 51.315(a) An incumbent LEC shall provide unbundled network elements in a manner that allows requesting telecommunications carriers to combine such network elements in order to provide a telecommunications service.
>
> § 51.315(b) Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines.
>
> § 51.315(c) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in the incumbent LEC's network, provided that such combination is:
>
> (1) technically feasible; and
> (2) would not impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.
>
> §51.315(d) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements with elements possessed by the requesting telecommunications carrier in any technically feasible manner.

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[1] 1FB is U S WEST's standard business service, and 1FR is standard residential service.

> §51.315(e) An incumbent LEC that denies a request to combine elements pursuant to paragraph (c)(1) or paragraph (d) of this section must prove to the state commission that the requested combination is not technically feasible.
>
> §51.315(f) An incumbent LEC that denies a request to combine elements pursuant to paragraph (c)(2) of this section must prove to the state commission that the requested combination would impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.

The Decision of the Eighth Circuit Court of Appeals allowed Rules 51.315(a) and (b) to remain in effect, but vacated Rules 51.315(c)-(f).

U S WEST's position[2]

U S WEST asserted that the Eighth Circuit's Decision vacating Rules 51.315(c)-(f) found that incumbent local exchange carriers ("ILECs") do not have to do all the work to recombine elements and therefore, it is not obligated to combine elements to form a service platform or call path. U S WEST claimed that network elements are combined temporarily to build a path for the duration of each telephone call. U S WEST argued that services such as 1FB and 1FR must be purchased at wholesale for resale; or elements should have to be combined with a network dedicated for a competitive local exchange carrier's ("CLEC's") use or combined with facilities of a CLEC, in order to be sold as telecommunications services.

U S WEST alleged that AT&T and MCI seek to purchase services as unbundled elements for the purpose of avoiding contribution to universal service. U S WEST claimed that its current 1FB service price exceeds its cost, and thereby subsidizes universal service. If 1FB service were available to CLECs at cost-based prices for unbundled elements, U S WEST argued, it would be unable to compete with CLEC offerings of 1FB service or would have to request authority to lower its 1FB service rate, and as a result, the universal service subsidy would evaporate. U S WEST also alleged that offering service platforms as unbundled elements shifts the risk associated with fluctuations in demand capacity from the CLECs to U S WEST.

U S WEST argued that Rule 51.315(b) is subject to a narrow interpretation. U S WEST claimed

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[2] In its briefs, U S WEST broadened the scope of the issue to be arbitrated beyond that which was submitted by the Commission. We will address only the issue set forth in Decision No. 60308 "combinations of network elements and whether 1FB, 1FR or other finished service can be requested as an unbundled network element, in light of the recent Court of Appeals 8th Circuit Opinion. . . ."

that the part of the FCC Order which explains Rule 51.315(b) is geared towards the situation where a State Commission has broken down FCC-defined network elements into multiple subelements, and prevents the ILEC from disaggregating the federally defined element into its state subparts absent CLEC approval.

AT&T's position

AT&T argued that both FCC Rule 51.315(b) and the nondiscrimination requirements of the Act prohibit U S WEST from disassembling presently combined network elements for sale to new entrants except at the new entrant's request.

AT&T indicated that the Eighth Circuit's Decision vacated solely the FCC provisions which required an ILEC to combine elements which are not normally combined in the ordinary course of the running of a network, and left intact the provision that an ILEC shall not separate requested network elements that it currently combines. The Eighth Circuit also held that a competing carrier may achieve the capability to provide telecommunications services solely through access to the unbundled elements of an ILEC's network. 1997 WL 403401, *26.

AT&T also pointed out that the Eighth Circuit did not vacate FCC regulations that define individual network elements to include connections to adjacent elements, e.g. 47 C.F.R. § 51.319(a), (c) and (d), and access to separate adjacent elements, e.g.. §51.319(e)(1)(ii) and (e)(2)(iii). AT&T also stated that the Eighth Circuit's Decision did not vacate an ILEC's duty to take whatever steps are required to allow CLECs to obtain access to network elements that are no less favorable than that which the ILEC provides to itself. Rule 51.313(b).

AT&T argued that no affirmative steps are required for an ILEC to discharge a duty when a CLEC orders network elements that are currently combined. AT&T claimed that it would be discriminatory when an new entrant places an order for an ILEC to disassemble the currently combined elements, only for the new entrant to then recombine them. AT&T asserted that U S WEST's position would require CLECs either purchase of dedicated facilities or finished services at resale, whereas the Act authorizes the capability to provide services completely through access to an ILEC's unbundled elements. *Iowa Utilities Board*, 1997 WL 403401, *25.

AT&T claimed that, contrary to U S WEST's assertions, routing a call through a network is

determined by the functions of the switch and signaling system, not as a result of any performance by U S WEST to combine elements. The Eighth Circuit upheld the FCC's conclusion that a network element purchased by a CLEC includes the facilities and equipment that are used in the overall commercial offering of telecommunications. The Eighth Circuit rejected arguments that an element is limited to the physical parts of a network which are directly involved in transmitting telephone calls from one point to another, and decided that services such as operational support systems should be available as unbundled elements. 1997 WL 403401, *25.

AT&T urged that the Commission reject U S WEST's assertion that a facility must be exclusively used by a CLEC for it to be a network element, and that a dedicated transportation network would have to be built in order for a CLEC to obtain transport as an unbundled network element. The signaling system, similar to a switch, cannot be partitioned so that a CLEC could have exclusive use to part of the facility. The requirement to construct a separate transportation network would be cost prohibitive, and would prevent a CLEC from being able to provide a switched service from unbundled elements, in violation of the Act, the FCC Order and the Eighth Circuit Opinion.

AT&T has not claimed that either 1FR or 1FB is a network element. AT&T has requested that it be permitted to purchase network elements that are combined in U S WEST's network, without U S WEST separating them for AT&T to recombine.

AT&T stated its willingness to comply with any universal service support system ordered by the Commission. AT&T indicated that present funding has been established by the Commission pursuant to A.A.C. R14-2-1204, not through any direct support from business to residential customers.

MCI's position

MCI argued similarly to AT&T that Rule 51.315(b) prevents U S WEST from separating requested elements which it currently combines, except upon request by a CLEC. MCI also claimed that the FCC Order Para. 295 was not a limitation upon the types of network elements that are combined by ILECs in general, but an example of combined network elements which would not be separated absent a request of a competitor.

MCI stated that it would be entitled to obtain combined elements which are combined by U S WEST for its own purposes. MCI claimed that if 1FR and 1FB are combined by U S WEST for itself,

then a CLEC would be entitled to those services as combined network elements.

In response to U S WEST's argument that MCI sought to purchase services as unbundled elements to avoid contribution to universal service, MCI assured the Commission that it was not attempting to avoid its universal service obligation. MCI is involved with the new task force to address universal service funding, and contributes to the fund as required.

Commission resolution

The FCC and the Eighth Circuit both agree that the Act § 251(c)(3) allows a requesting carrier access to an ILEC's unbundled elements which are sufficient to enable the carrier to provide telecommunications services. The Eighth Circuit also endorsed the FCC's statement that "the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements." FCC Order, Para. 198, and 1997 WL 403401, *32, fn 33. CLECs must be allowed access to switching and transport functions in order to be able to provide services completely through unbundled elements.

The Eighth Circuit vacated rules which required ILECs to actively combine network elements solely for the benefit of CLECs, such as elements which are not presently offered as combined. U S WEST urged the Eighth Circuit to overturn Rule 51.315(b), but the Eighth Circuit Decision left intact Rule 51.315(b), which requires ILECs to provide combinations of elements which currently are combined.

Furthermore, the Eighth Circuit Decision allows an ILEC to refuse to actively combine elements to create new services upon request by a CLEC, which would then be purchased at unbundled rates and marketed by CLECs. The function of a switch and related elements to combine to form a call path is not the type of combination which causes an ILEC to perform a duty to combine elements, but is an intrinsic function and capability of the elements themselves. The function need not be permanent or exclusively dedicated to any carrier, but is available when the element is purchased. As with switching or operator services in general, there is no requirement that a portion of the element be partitioned for the sole use of a CLEC.

Consistent with the Act, the FCC Rules, and the Eighth Circuit Opinion, we find that Rule 51.315(b) allows a CLEC to order as combined those elements which an ILEC currently combines. The

Act enables a CLEC to purchase all of the elements necessary for a finished service on an unbundled basis. Therefore, the parties' interconnection agreements shall include the following language:

> Attachment 3
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> 1.2.2 U S WEST shall offer each Network Element individually and in Combinations as required by law, with any other Network Element or Network Elements in order to permit AT&T [MCIm] to combine such Network Element or Network Elements obtained from U S WEST or with network components provided by itself or by third parties to provide Telecommunications Services to its subscribers. AT&T [MCIm] may purchase unbundled Network Elements individually or in Combinations that U S WEST currently combines, without restrictions as to how those elements may be rebundled by AT&T [MCIm].
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> Attachment 5
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> 3.2.15.1 AT&T [MCIm] may order individual and/or multiple unbundled Network Elements, and combinations of unbundled Network Elements as required by law, on a single order. AT&T [MCIm] may order Unbundled Network Elements without restriction as to how those elements may be rebundled. Except upon request, U S WEST shall not separate network elements that are currently combined.

* * * * * * * * * * *

Having considered the entire record herein and being fully advised in the premises, the Commission finds, concludes, and orders that:

FINDINGS OF FACT

1. U S WEST is certificated to provide local exchange and intraLATA telecommunications services to the public in Arizona, pursuant to Article 15 of the Arizona Constitution.

2. AT&T and MCI are certificated to provide local exchange and intrastate telecommunications services to the public in Arizona.

3. On July 29, 1996, AT&T filed with the Commission a petition for arbitration to establish an interconnection agreement with U S WEST.

4. On September 4, 1996, MCI filed with the Commission a petition for arbitration to establish an interconnection agreement with U S WEST.

5. On December 10, 1996, the Commission issued Decision No. 59915 which set forth its resolution of the issues in dispute between AT&T and U S WEST, and directed the parties to file a written interconnection agreement which included those terms which were voluntarily resolved between the parties and those on which the Commission directed a resolution.

6. On December 18, 1996, the Commission issued Decision No. 59931 which set forth its resolution of the issues in dispute between MCI and U S WEST, and directed the parties to file a written interconnection agreement which included those terms which were voluntarily resolved between the parties and those on which the Commission directed a resolution.

7. Additional issues in dispute arose between AT&T and U S WEST, and MCI and U S WEST when the parties attempted to prepare their interconnection agreements.

8. By Procedural Order dated March 10, 1997, the unresolved issues were scheduled for a combined arbitration between U S WEST, AT&T and MCI.

9. Decision No. 60308 approved the interconnection agreements between AT&T and U S WEST, and MCI and U S WEST, including negotiated and arbitrated provisions, and directed further arbitration on the issues of combinations of network elements and whether the 1FB, 1FR or other finished service can be requested as an unbundled network element, in light of the Eighth Circuit Decision. Decision No. 60308 ordered that arbitrated contract language concerning those issues to be incorporated into the parties' interconnection agreements.

10. On August 6, 1997, the parties filed briefs on the issues to be arbitrated. On August 8, 1997, the parties filed reply briefs, with oral argument held by teleconference on August 8, 1997.

11. The Commission adopts the resolution of this remaining issue as stated in the above Discussion, and incorporates that resolution herein.

CONCLUSIONS OF LAW

1. U S WEST, AT&T and MCI are public service corporations within the meaning of Article XV, Section 2 of the Arizona Constitution.

2. MCI and AT&T are telecommunications carriers within the meaning of 47 U.S.C. Section 252.

3. U S WEST is an incumbent local exchange carrier within the meaning of 447 U.S.C. Section 252.

4. The Commission has jurisdiction over U S WEST, AT&T and MCI, and over the subject matter of the application.

5. The Commission's approval of the arbitrated language to be included in the parties'

interconnection agreements is just and reasonable, meets the requirements of the Act and all applicable laws, and is in the public interest.

6. The Commission maintains jurisdiction over the subject matter of the interconnection agreements and amendments thereto to the extent permitted pursuant to the powers granted the Commission by the Arizona Constitution, Statutes, Commission Rule and the Federal Act and rules promulgated thereunder.

ORDER

IT IS THEREFORE ORDERED that within thirty days from the date of this Decision, the parties shall incorporate within their interconnection agreements the language approved in the above Discussion, and file confirmation of such incorporation with the Commission.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN COMMISSIONER COMMISSIONER

IN WITNESS WHEREOF, I, JACK ROSE, Executive Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 29th day of August, 1997.

JACK ROSE
EXECUTIVE SECRETARY

DISSENT
BMB:dap

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DOCKET NOS.: U-3175-96-479; E-1051-96-479; U-2428-96-417 and E-1051-96-417

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DECISION NO. 60353

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